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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/774,150	02/06/2004	Michael Schwartz	26763-001 US NA	7291
26691	7590	12/28/2004	EXAMINER	
POTTER ANDERSON & CORROON LLP ATTN: KATHLEEN W. GEIGER, ESQ. P.O. BOX 951 WILMINGTON, DE 19899-0951			VALENTI, ANDREA M	
		ART UNIT	PAPER NUMBER	
		3643		

DATE MAILED: 12/28/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	10/774,150	SCHWARTZ, MICHAEL
	Examiner	Art Unit
	Andrea M. Valenti	3643

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) Responsive to communication(s) filed on 06 February 2004.
- 2a) This action is FINAL.      2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-20 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.
  - Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
  - Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
  - a) All    b) Some \* c) None of:
    1. Certified copies of the priority documents have been received.
    2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
    3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) Notice of Informal Patent Application (PTO-152)
- 6) Other: \_\_\_\_\_.

**DETAILED ACTION**

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 2, 5, 9-12, 15, 20 are rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 5,349,780 to Dyke.

Regarding Claim 1, Dyke teaches an apparatus assembly comprising: (a) a tubular metal pipe or conduit having an upper end and a lower end (Dyke Fig. 3 #30 and Col. 1 line 17 and 37-39); (b) an enclosing device (Dyke #108) removably engaged with said upper end of the tubular pipe or conduit, and, (c) a tapered stopper (Dyke #88 and 80) removably engaged with said lower end of the tubular metal pipe or conduit.

Regarding Claim 2, Dyke teaches a means for connecting (Dyke #1 #60) the tubular metal pipe or conduit to a tree.

Regarding Claims 5 and 15, Dyke teaches the tubular metal pipe or conduit has a length ranging from about 6 to about 15 feet (Dyke Col. 3 line 3).

Regarding Claims 9 and 20, Dyke teaches the tubular pipe or conduit has apertures (Dyke Fig. 3 #34).

Regarding Claim 10, Dyke teaches a process for making the apparatus of claim 1 comprising: (i) engaging an enclosing device (Dyke Fig. 3 #108) with an upper end of a tubular metal pipe or conduit, (ii) engaging a tapered stopper (Dyke Fig. 3 #88) with a

lower end of the tubular metal pipe or conduit, and, optionally (iii) providing a means for connecting the tubular metal pipe or conduit to a tree (Dyke Fig. 1 #60).

Regarding Claim 11, Dyke teaches an apparatus assembly comprising: (a) a tubular metal pipe or conduit (Dyke Fig. 4 #32) having an upper end (Dyke Fig. 4 #36) and a flattened lower end (Dyke Fig. 4 #44), and (b) a cap (Dyke Fig. 4 #108) removably engaged with said upper end of the tubular pipe or conduit.

Regarding Claim 12, Dyke teaches (c) a means for connecting the tubular metal pipe or conduit to an immature tree (Dyke Fig. 1).

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 3, 4, 6, 7, 13, 14, 16, 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 5,349,780 to Dyke.

Regarding Claims 3, 4, 6, 7, 13, 14, 16, 17, Dyke is silent on the tubular metal pipe or conduit has a diameter ranging from about  $\frac{1}{2}$  inch to about 1 inch; a diameter of about 0.922 inches; a gauge ranging from 15-19. However, it would have been obvious to one of ordinary skill in the art to modify the teachings of Dyke at the time of the invention since the modifications are merely a change in size and thickness of material. This modification is merely an engineering manufacturing design choice selected to meet certain engineering design parameters such as cost. The gauge and the diameter

also depend on the size of the plant and the plant variety being supported. A dogwood tree would require a different gauge and diameter than a tomato plant. The decision could be made on the availability of raw materials and the climate conditions where the device will be put into practice [*Leshin* 125 USPQ 416 and *In re Rose*, 220 F.2d 459, 463, 105 USPQ 237, 240 (CPA 1955)].

Claim 8 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 5,349,780 to Dyke in view of U.S. Patent No. 6,122,859 to Lazar.

Regarding Claims 8 and 19, Dyke teaches string and element #60, but is silent on the means for connection is an elastic ribbon. However, Lazar teaches an elastic ribbon for connecting a support post to a tree (Lazar abstract). It would have been obvious to one of ordinary skill in the art to modify the teachings of Dyke with the teachings of Lazar at the time of the invention for the advantage of limited mobility of the plant limb relative to the support member as taught by Lazar (Lazar Col. 1 line10-11).

Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 5,349,780 to Dyke in view of U.S. Patent No. 249,803 to Sparks.

Regarding Claim 18, Dyke is silent on the tapered stopper being solid. However, Sparks teach a support post with a solid tapered stopper (Sparks Fig. 2 element B). It would have been obvious to one of ordinary skill in the art to modify the teachings of Dyke at the time of the invention with the teachings of Sparks since the modification is

merely an manufacturing design choice selected for a more durable ground insertion point.

***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Japanese Patent JP60232028; U.S. Patent Des. 293,874 ; U.S. Patent No. 1,984,265 ; U.S. Patent No. 3,345,774; U.S. Patent No. 6,516,561; U.S. Patent No. 1,031,941.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Andrea M. Valenti whose telephone number is 703-305-3010. The examiner can normally be reached on 7:30am-5pm M-F; Alternating Fridays Off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Peter M. Poon can be reached on 703-308-2574. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only.

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For more information about the PAIR system, see <http://pair-direct.uspto.gov>.

Should you have questions on access to the Private PAIR system, contact the  
Electronic Business Center (EBC) at 866-217-9197 (toll-free).

*Andrea M. Valenti*  
Andrea M. Valenti  
Patent Examiner  
Art Unit 3643

22 December 2004

*Peter M. Poon*  
Peter M. Poon  
Supervisory Patent Examiner  
Technology Center 3600